COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD Nos. 55064-98 56542-00 23568-01**

Johnnie R. Mims	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Carroll and Costigan)

APPEARANCES
John K. Ford, Esq., for the employee
Martin J. Long, Esq., for the self-insurer

MCCARTHY, J. The self-insurer's appeal identifies a circumstance where an administrative judge made more work for herself than was necessary. The context is a recurring one, involving a gap in expert medical opinion for a portion of the claimed period of incapacity. The "gap" is almost always the disputed period of incapacity between the commencement of the claim (the industrial accident in this liability case) and the § 11A impartial medical examination. But when is the "gap" not a gap?

In the case at hand, the extra work which the judge solicited involved the introduction of the parties' medical evidence for the supposed "gap." Under the circumstances of this case, we conclude that there was no need for such additional medical evidence. The error that the self-insurer correctly asserts with regard to that evidence is therefore harmless, as the judge's award of § 34 benefits was supported by the adopted impartial medical opinion, in any event. We do reverse the judge's ruling on the necessity of surgery, however, as the issue was not presented for determination, and the employee agreed to a reservation of rights on that issue.

Mr. Mims worked for the M.B.T.A. doing heavy physical labor starting in 1980. He suffered a series of work-related accidents – both to his lower back and to his left

shoulder - from March 1997 until May 24, 2001. On that last date of injury, the employee reinjured his left shoulder, low back and left leg. The employee underwent surgery on his left shoulder on September 5, 2001. (Statutory Ex. 1, p. 3.)

The employee claimed § 34 benefits ongoing from the May 24, 2001 injury. The judge awarded benefits under §§ 34 and 35 following a § 10A conference, and both parties appealed to a full evidentiary hearing. (Dec. 2.) Mr. Mims underwent a § 11A medical examination by an orthopedic surgeon, Dr. Edwin T. Wyman, on May 14, 2002. Dr. Wyman diagnosed the employee with degenerative changes in the lumbar spine dating back to the 1997 work injury, and degenerative changes in the left shoulder since his 1999 work injury. Dr. Wyman opined that the employee had many work injuries aggravating his degenerative changes, which resulted in a soft tissue strain of his lower back with some radiculopathy, and tendinitis in his shoulder, for which surgery had been only partially successful. Dr. Wyman opined that the employee was unable to carry on activities requiring repeated stooping, bending, lifting, climbing, prolonged sitting or work with his left arm above his chest for repetitive or heavy activities. (Dec. 3-4.) The doctor therefore restricted his possible work activities to those "entirely administrative in nature." (Statutory Ex. 1.) The judge permitted the parties to submit additional medical evidence to cover the one-year "gap" period before the § 11A medical examination. (Dec. 2; Tr. 3.) The parties submitted "gap" medicals, which the judge listed only generally under "Exhibits" as "Gap Medical Evidence" of each party. (Dec. 1; Employee's Ex. 3; Self-insurer's Ex. 2.)

The judge found the impartial medical report adequate, with the exception of the "gap" period before the examination. (Dec. 5.) She credited the employee's accounts of all of his work injuries at the M.B.T.A., from March 1997 up to and including his last injury of May 24, 2001, (Dec. 4-5), and adopted the "employee's 'gap' medical evidence" for that period of incapacity. (Dec. 5.) The judge otherwise adopted the opinions of the impartial physician, Dr. Wyman, absent one. The judge adopted the employee's "gap" medicals as to the necessity and advisability of potential low back surgery. The judge found the impartial physician's opinion that such treatment may not

be appropriate was not offered to a reasonable degree of medical certainty, and that the doctor had not addressed the significance of MRI findings showing degenerative stenosis at L5-S1. (Dec. 4-5; Statutory Ex. 1.)

Finally, the judge performed a vocational analysis:

> The employee has spent the last 20 years of his working life engaged in heavy laboring. Indeed, he attempted to carry on working using pain medication. Although he may have been a working foreman, there is no indication that he possesses any administrative skills that would make him suitable for that type of sedentary work, or any skills that would be readily transferable to other kinds of sedentary work. Given his medical condition, and taking into account his age [56], education [high school], and experience, I conclude that the employee would not be able to obtain employment of more than a trifling nature in the open labor market.

(Dec. 6.) The judge awarded the employee ongoing § 34 benefits. (Dec. 6.)

On appeal, the self-insurer adverts to errors in the judge's treatment of the § 11A medical report and the additional medical evidence, which the judge allowed on her own initiative, for the pre-examination "gap" period. In particular, the self-insurer challenges the judge's generalized adoption of "the employee's gap medical evidence" and her use of that evidence for an issue other than the "gap." While the self-insurer is correct in its arguments, we see the errors as harmless.

Underlying our review of the case before us is a matter of concern: the unnecessary and needlessly confusing allowance of additional medical evidence for the disputed period of incapacity prior to the impartial medical examination, without regard to whether such an evidentiary "gap" actually exists. Such allowances simply create more work and appeals.

The judge's "analysis" of the "gap" in this case was simply the following: "There is a gap period between Dr. Wyman's report and the date of injury, various dates of injury, so the parties will be giving me all gap medicals . . . ." (Tr. 3.) The first part of the statement is a truism, which lends no support to the allowance of additional medical evidence. "[W]e have not adopted a per se rule regarding the adequacy or inadequacy of the § 11A medical report regarding the pre-examination period." Cugini v. Town of

Braintree School Dep't, 17 Mass. Workers' Comp. Rep. 363, 366 (2003). Just as in Cugini, the present case presents a "gap" for which the adopted opinion of the impartial physician that the employee was significantly restricted in his ability to perform his usual work functions due to his work injuries is adequate. Cugini, supra. (Dec. 4-5.)

> The doctor's opinion could support the inference that the employee's medical status, from the commencement of his claim . . . until the impartial examination . . . was essentially unchanged. See Conroy v. Fall River Herald News Co., 306 Mass. 488, 493 (1940)("Not infrequently an inference is permissible that a state of affairs . . . proved to exist, has existed for some time before") ; Jenkins v. Nauset, Inc., 15 Mass. Workers' Comp. Rep. 187, 191 (2001(citing Conroy, supra, and reading later medical report to support prior period of disability).

Cugini, supra. The applicability of and similarities to Cugini do not end there. Just as in that case, "the employee [here] testified that he had not worked since the industrial accident because he was in pain and could not perform." Id. (Tr. 31-34.) "The judge credited the employee's reports of pain, and used it to find the employee totally incapacitated." Id. (Dec. 4, 6.) As such, we conclude that the judge's non-specific reference to and adoption of "the employee's medical evidence consisting of records of his treating physicians," (Dec. 5), for the purpose of filling the "gap" is harmless error. The simple adoption of the impartial medical opinion would have sufficed nicely to support the judge's general finding of ongoing total incapacity. The unnecessary additional "gap" medicals only served to muddy the waters.[1]

[1] By our discussion here, we in no way intend to leave the impression that there are no real "gaps" for which additional medical evidence is still required. Where the impartial medical opinion reasonably cannot be read to cover the prior period of claimed incapacity, and questions of the extent of medical disability are actually at issue as to that period, "gap" medicals are appropriate, and employee counsel are well-advised to request their admission. See, e.g., George v. Chelsea Hous. Auth., 10 Mass. Workers' Comp. Rep. 22, 26 (1996)(impartial medical opinion that cannot be read, with the lay testimony, to properly address medical issue in prior period of contested incapacity is inadequate for that period as matter of law); Hernandez v. Crest Hood Foam Co, Inc., 13 Mass. Workers' Comp. Rep. 445, 452-453 (1999)(McCarthy, J., dissenting)("If the doctor had an opinion as to Mr. Hernandez's medical disability during the four years preceding his examination, he was careful not to voice it"). The point here is that the judge must make some analysis of the impartial medical opinion to reach that conclusion, not just assume that additional medical evidence is required for every "gap" that emerges in a § 11A case (i.e., *every* § 11A case).

The further error created by the "gap" medicals is that of the judge's adoption of the employee's medicals to support her conclusion that back surgery was reasonable and necessary. "Gap" medicals, when allowed for that reason of providing evidence in the retrospective pre-examination period, may not then be used for other medical issues in the case, such as *present* disability or – as in this case – the reasonableness of a possible course of treatment. We have addressed this error in recent cases.

> In Gulino v. General Elec. Co., 15 Mass. Workers' Comp. Rep. 378 (2001), "the judge allowed the parties to introduce their own medical evidence to address the employee's medical status during the 'gap' period from the date of injury until the impartial examination. (Dec. 304; Addendum to the Dec. 318)" Id. at 379. Then, "after the close of the record and without further communication with the parties, in the hearing decision the judge ruled that the impartial physician's opinion was inadequate as to continuing causal relationship, and that additional medical evidence was necessary for that issue, as well as the 'gap' period. (Dec. 301, 304; Addendum, 318-319.)" Id. at 379-380. We concluded:
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> > Having changed the scope of his § 11A inadequacy ruling to include a primary issue in the litigation – continuing causal relationship between the work injury and the employee's present disability – the parties had a right to have the opportunity to put forward evidence on that dispute. See O'Brien's Case, 424 Mass. 16, 23 (1996)(failure of due process results from foreclosing "opportunity to present testimony necessary to present fairly the medical issues"). Here, the parties had the right to take depositions, both to challenge their opponent's medical evidence and to bolster their own. The judge could not procedurally cut off the parties' opportunity to develop their cases in that manner.

Behre v. General Elec. Co., 17 Mass. Workers' Comp. Rep. 273, 277 (2003), quoting Gulino, supra.

The error in the present case – using the employee's treating physicians' opinions as to the reasonableness of potential back surgery, when those opinions were allowed only to address the prior "gap" period of medical disability – is of the same nature as that described in Gulino and Behre. The judge never made a ruling that the impartial opinion was inadequate in its assessment of the potential surgery prior to her filing the decision.

There, she did rule to that effect: "Dr. Wyman did not state, that his caution concerning the advisability of back surgery was offered to a reasonable degree of medical certainty. Even if he had done so, he failed to address the significance of the MRI findings." (Dec. 6.) The self-insurer had no way of knowing that the judge was going to expand her ruling of inadequacy to include this topic, and no opportunity to respond to such a ruling.

The error is compounded by the fact, which the employee concedes, that the possible surgery was not even at issue in the hearing. Therefore, we follow the employee's and self-insurer's converged approaches to this error, and reverse the finding, while reserving the issue for proper litigation as necessary in the future.

We otherwise affirm the decision as all other errors are harmless. We award counsel for the employee an attorney's fee under § 13A(6) in the amount of $1,276.27.

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: **May 27, 2004**

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge